IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. z-707110 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Jesse Bonza NATIVIDAD

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1880

Jesse Bonza NATIVIDAD

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 27 November 1970, an Examiner of the United States Coast Guard at Honolulu, Hawaii, suspended Appellant's seaman's documents for three months on nine months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as steward on board SS AMERICAN FORWARDER under authority of the document above captioned on or about 4 July 1970, Appellant deserted the vessel at Manila, Philippine Islands.

At the hearing, Appellant elected to act as his own counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence voyage records of AMERICAN FORWARDER.

In defense, Appellant offered in evidence his own testimony, a report of a doctor in Manila that he was fit for duty, a letter recounting telecommunications exchanges between the U.S. Lines agent in Manila and AMERICAN FORWARDER, at Da Nang, R.V.N., and a Public Health Service report of 19 November 1970 made at Honolulu.

At the end of the hearing, the Examiner rendered an oral decision in which he concluded that the charge and specification had been proved. The Examiner then served a written order on Appellant suspending all documents issued to Appellant for a three months on nine months' probation.

The entire decision was served on 10 December 1970. Appeal was timely filed on 9 December 1970.

FINDINGS OF FACT

From 11 June to 4 July 1970, Appellant was serving as steward on board SS AMERICAN FORWARDER and acting under authority of his document.

On 4 July 1970, at Lokanin Pt., P.I., Appellant reported to the master of the vessel with a request that he be given a "master's certificate" for medical examination so that he could go to Manila and be declared unfit for duty. Appellant's stated plan was he could thus be flown to Bangkok at company expense to rejoin the vessel.

Appellant maintains a mailing address in Quezon City in the Philippines.

When the master refused to cooperate in this plan, he advised Appellant that if he left the ship without permission he would do so in disobedience of the master's orders. Appellant threw down his [steward's] keys and left the ship carrying all his personal effects.

At some later time on 4 July 1970, AMERICAN FORWARDER was at sea [destination not ascertainable from the record].

On 8 July 1970, Appellant was found fit for duty by a doctor in Manila (described by Appellant as the "company" doctor). On 14 July 1970 the vessel's agent in Manila communicated to the vessel, at Da Nang, both directly to the vessel and via the company's agent in Saigon, Appellant's desire to rejoin the vessel. The master replied that Appellant had no wages due because he was a deserter and that the wages were payable to a District Court.

Appellant's wife lives in Quezon City.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant's conditions are numerous. They often repeat each other although urged as separated "points." I shall treat them in appropriate divisions of the OPINION below.

APPEARANCE: Klein & Sterling, New York, N.Y., by Ernest Mahler of Counsel.

OPINION

I

When Appellant urges that the burden of proof was on the Investigating Officer in this case and that "substantial" evidence

must be the basis for any finding adverse to Appellant (citing numerous Federal court decisions), I cannot but agree. When Appellant speaks in terms of "preponderance of the evidence" as an essential test I cannot agree. The word "preponderance," both etymologically and legally, deals with weight. It is the function of an examiner to assign "weight" to the evidence before him. I have said on several occasions that when an examiner has assigned "weight" to evidence, I will not disturb his findings if the evidence on which he relied for his findings is substantial ("more than a scintilla") and of a reliable and probative nature.

Since I have delegated to examiners the power to make initial decisions on the record, it follows that my review of the record must not be a "hearing de novo." If the evidence on which an examiner relies is of the proper quality and quantity in and of itself, it would be arbitrary and capricious for me not to accept his findings unless the evidence on the whole record was so compelling as to command a different finding by a reasonable person, in which case, obviously, the substantiality, reliability, and probative value of the evidence initially accepted as the basis of findings would have been so completely undermined and destroyed as to render the examiner's findings arbitrary and capricious. The mere word "preponderance" has no place in these proceedings.

II

Appellant cites several cases in support of his proposition that when two findings can be arrived at the finding must be against the one who carries the burden of proof. The principle of the decisions on which he relies cannot be contested. But the principle of decision in the cases he cites has no application here.

It is undoubtedly true, as the Appellant's cited decisions hold, that if two opposed conclusions can reasonably be inferred from the evidence presented by a plaintiff in a civil court action judgment must be for the defendant. This is not the case we have here. On the evidence adduced by the bearer of the burden of proof in this case there are no two opposed conclusions that can reasonably be inferred. The official log entry, as prima facie evidence of the facts recited therein, can lead to only one reasonable conclusion, that Appellant deserted.

Appellant's argument seems to be based on the unspoken theory of an instruction frequently asked for in a criminal trial, after the whole case is in: "If you find the evidence equally consistent with defendant's innocence as with his guilt, you must acquit." It must be understood that the word "credible" is implicit with respect to "evidence" in such a situation. Although criminal

procedure rules do not control in these administrative proceedings, I would agree that if an examiner found that on all the credible evidence in the case either of two inferences were supportable the inference favorable to the person charged should be the one found.

We are not dealing here with inferences, however, and we are not dealing with a case in which opposing evidence can simultaneously be accepted as true. One either believes the log entry, which is prima facie evidence of the facts in itself (46 CFR 137.20-107), or one believes the evidence adduced by Appellant. They cannot both be believed so as to permit conflicting inferences of equal validity such as to be resolved in favor of Appellant.

The Examiner accepted the log entry and did not accept Appellant's evidence as persuasive. The evidence accepted by the Examiner was substantial evidence of a reliable and probative nature. Some comment on why the Examiner's rejection of Appellant's evidence was eminently correct will be offered below, although comment is not necessary, when I discuss the nature of the evidence offered by Appellant at hearing and the material that Appellant has offered to induce a reopening of the hearing for the introduction of more evidence. Nonetheless, it must be noted here, that the record establishes that Appellant's wife lives in Quezon City, a place where a doctor, to whom Appellant resorted on 19 July 1970, had an office. This fact, if more were needed to support it, broods over the reliability of the master's report of Appellant's plan.

III

Several of Appellant's "points" may be grouped together here for purposes of rational discussion of the questions posed.

The Examiner did not err in failing to advise Appellant of the seriousness of his offense. He advised Appellant that his seaman's papers could be revoked, the most serious consequence possible, if the charge were to be found proved. Appellant makes the appellate assertion, item 2 in his original notice of appeal, that he was "under the impression that the worst possible consequence of the hearing would be a `failure to join the vessel'; since his communications to the vessel after July 4, 1970, showed that he wanted to return to the ship." It is not consistent with Appellant's asserted ignorance of the seriousness of "desertion" as an offense, that one also is asked to believe that Appellant was so acutely aware of the distinction between "failure to join" and "desertion," that he thought that at the hearing under R.S. 4450 only "failure to join" could be found. The evidence here amply supports a finding that Appellant left the vessel with the intent not to return to it, if at all, until the vessel was at a port

another country. A departure from a ship without authority with no intention to return to it before it sails from the port at which the departure of the seaman from the ship takes place is desertion. (see Decision on Appeal No. 1642).

Appellant urges that his ignorance of the seriousness of the charge rendered his waiver of right to counsel or "right" to transfer of the hearing to Portsmouth, Va., ineffective. As I have mentioned above, the Examiner explained to Appellant that his document could be revoked. Despite this notice (also given by the Investigating Officer at the time of service of charges), Appellant freely decided to proceed without counsel. Of course, Appellant had no "right" to a change of venue. He did not request one, and the Examiner had no duty to inform him that he had the right to move for a change of venue.

Appellant also asserts that the Examiner erred in not advising him that he had the right to subpoena records from the shipping company. It is true that the Examiner's advice was only as to Appellant's right to subpoenas for witnesses and not about subpoenas for records. No error is perceived here, especially since there is no offer of proof, even on appeal, of a company or ship's record which would have been relevant. However although Appellant also complains that he was not advised that his claim of injury would have to be corroborated by records, the fact is that Appellant's Exhibit A is precisely a medical record, offered to corroborate his claim to have suffered an injury. Unfortunately, it declared Appellant fit for duty on examination on 8 July 1970.

IV

It is asserted that the Examiner's order is too severe, even if Appellant in fact deserted. The Table of Average Orders (46 CFR 137.20-165) places desertion in a foreign port in "Group D." The entry in the column for "first offense" lists an outright suspension of six months as appropriate. Even though the Examiner properly considered Appellant's prior clear record in arriving at his order, it can be seen that a suspension of three months placed entirely on probation is extremely lenient.

V

In Appellant's initial statement of grounds for appeal in his undated notice received on 9 December 1970 he declared that his case should be reopened so that he could produce evidence of examination and treatment by another doctor, named Pardo, practicing in Manila and Quezon City. Attached to Appellant's final brief is a copy of a "Medical Certificate" from that doctor. The medical certificate is dated "July 19, 1970." A medical

certificate thus dated cannot be considered "newly" discovered evidence relative to a hearing held on 27 November 1970 such as to warrant an order to reopen.

Of some significance in consideration of his "certificate," which declared on 19 July 1970 that "he [Appellant] is not fit for duty, "is that it was issued four days later Appellant learned that the master of AMERICAN FORWARDER refused to have him back aboard because he was a deserter and five days after Appellant had volunteered to the vessel's agent in Manila that he was willing to rejoin the vessel. No further comment is needed on this offer of proof.

VI

One point raised by Appellant in his original notice gives me pause. In the document, received by the Coast Guard on 9 December 1970, he complains that the Examiner erred in entering his order of 27 November 1970 by not making "specific findings and conclusions in connection with his final decision...". Appellant further declares, "the person charged was only served with a copy of the said final decision and has no knowledge of any findings or conclusions in this case."

In my preliminary remarks I noted that the Examiner had, on 27 November 1970, stated that he found the specification and charge proved and had delivered the written order of suspension on probation to Appellant. The Examiner orally stated and the order itself recited that Appellant's thirty days for filling notice of appeal began that date. While the Examiner's complete decision was not issued to until 7 December 1970 (with notation that it could be served on Appellant by "registered mail" at an address in Quezon City, P.I.) it appears that this decision was served on Appellant in Honolulu on 10 December 1970.

When Appellant's attorneys in New York filed the notice of appeal received on 9 December 1970 (and I will not speculate on how the attorneys in New York could file a four page notice of appeal with ten assignments of error when Appellant was still in Honolulu on 10 December 1970), it is apparent that the full decision was not available either to Appellant or his retained counsel at the time the notice of appeal was filed. I admit that I can understand that feelings of counsel, faced with the need to file a notice of appeal within a statutorily prescribed limit of thirty days but handicapped by not having at hand the full decision so as to know all details of what they were appealing from. 46 CFR 137.20-175(b) and 46 CFR 137.30-1(a) authorize the procedure followed in this case.

I find no prejudice to Appellant in this case because:

(1) he did not need to have in hand the full decision in order to file notice of appeal (as he, in fact, did in timely fashion), and

(2) he had the full decision in hand for three months before he was required to perfect his appeal.

I note that both the specification and the finding of the Examiner speak of a desertion at Manila. The evidence shows that the desertion occurred at "Lokanin Pt., P.I." and that the vessel was at sea, destination unstated, when the record of the desertion was made by the master. There is nothing in the record to suggest that official notice was taken that Lokanin Pt. is encompassed within the geographical concept of "Manila." In fact, the evidence shows that Appellant wished "to go to Manila."

The evidence tended to prove that the desertion occurred at Lokanin Pt. and there is no evidence tending to prove that Appellant left the vessel at one place but formulated his intention not to return at another place, Manila. I will not bother to resort to official notice to correct an apparent discrepancy. The exact geographical description of the place where a desertion occurred is not of the essence if an issue is not made of it. No correction of the findings is necessary.

CONCLUSION

I conclude that the charge and specification were proved by the required quality and quantity of evidence, that no infringement of any right of Appellant occurred in the case, and that no reason for any further proceedings, such as reopening the hearing, has been offered.

ORDER

The order of the Examiner dated at Honolulu, Hawaii on 7 December 1970, is AFFIRMED.

T. R. Sargent
Vice Admiral, U.S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 7th day of June 1972.

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